Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT

JOSEPH A. LEVINE,
Petitioner,

v.

THE GREECE CENTRAL SCHOOL DISTRICT, MONROE-2 ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HEOFT, AMY PERITSY, AND KENNETH MERKEY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether conflicting precedents between the Circuit Courts violate the Fourteenth Amendment constitutional guarantees of due process and equal protection when some Circuit Courts divest district courts of their subject matter jurisdiction in cases involving failures to exhaust administrative remedies pursuant to the **Individuals with Disabilities Education Act** ("IDEA") [20 U.S.C. § 1400 *et seq.*] while other Circuit Courts treat such failure to exhaust administrative remedies as an affirmative defense.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
TABLE OF CONTENTS..... ii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI .. 1
OPINION BELOW 2
JURISDICTION 2
CONSTITUTIONAL PROVISIONS 4
CONCISE STATEMENT OF THE CASE..... 5
I. WESTERN DISTRICT COURT OPINION. 5
II. THE COURT OF APPEALS AFFIRMS..... 8
REASONS FOR GRANTING THE PETITION 9
I. POINT : CONFLICT EXISTS AMONG THE CIRCUIT COURTS REGARDING WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES PURSUANT TO THE INDIVIDUALS WITH DISABILITIES ACT ("IDEA") DIVESTS DISTRICT COURTS OF SUBJECT MATTER JURISDICTION OR WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE. 9
A.INTRODUCTION..... 9
B. "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES" IS A JURISDICTIONAL DEFECT IN THE SECOND CIRCUIT 11

C. That the "Exhaustion" requirement, even in the Second Circuit is not absolute, lends credence to the point that it must not be jurisdictional. 13

D. Even if the Second Circuit decided that no exception applied here, its ruling nonetheless derived from the Circuit's rule that the failure to exhaust is jurisdictional and not an affirmative defense..... 17

E. There is an irreconcilable conflict in the circuits on the issue of whether the failure to exhaust administrative remedies is jurisdictional..... 23

F. The issue herein is one of national importance in that this court should give guidance to disabled students..... 25

CONCLUSION 26

APPENDIX A: Second Circuit Decision A-1

TABLE OF AUTHORITIES

Federal Cases

Avoletta v. City of Torrington, 2008 WL 905882 (D.Conn. 2008) 20

Cave v. East Meadow Union Free Sch. Dist., 514 F.240 (2d Cir. 2008) 11, 21-22

Charlie F. v. Bd. of Ed. of Skokie Sch. Dist. 68, 98 F.3d 989 (7th 11Cir.1996) .24

Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198 (2d Cir. 2007).18-20

Eberhart v. United States, 546 U.S. 12 (2005) 24

Ellenberg v. New Mexico Mil. Instit., 478 F.3d 1262 (10th Cir. 2007) 23

Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148 (2d Cir. 1992).....17

J.P. v. Cherokee County Bd. of Ed., 218 Fed. Appx. 911 (11th Cir. 2007). 23

J.S. v. Attica Cent. Schools, 386 F.3d 107 (2d Cir. 2004) 6-7

K.B. et al v. Bd. of Ed. of the Greece Central Sch. Dist., 05-CV-06261(DGL) (W.D.N.Y. 2007).... 16

Levine v. Greece Central Sch. Dist., et al, 2009 WL 3765813 (2d Cir. 2009) - throughout

Michaels ex rel. Michaels v. Mills, 2004 WL 816918 (W.D.N.Y. 2004) 15

Mitchell v. Maurer, 55 S.Ct. 162 (1934) 26

M.M. v. Sch. Dist. Of Greenville County, 303 F.3d 523 (4th Cir. 2002).... 23

Mosely v. Bd. of Ed. of City of Chicago., 434 F.3d 527 (7th Cir.2006) . 23-24

Mrs. W. v. Tirozzi, 832 F.2d 748 (2d. 1987)..... 14

Pedroza v. Los Alamitos Sch. Dist., 302 Fed.Appx. 608 (9th Cir. 2008) 23

Polera v. Bd. of Ed. of the Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2d Cir. 2002)..... 15, 17

Scaggs v. New York Dept. of Ed., 2007 WL 1456221 (E.D.N.Y. 2007) 17

S.J.B. ex rel. Berkhout v. New York City Dept. of Ed., 2004 WL 1586500 (S.D.N.Y. 2008) 17

Spencer v. Kemna, 523 U.S.117, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)..... 12

Steel Co. v. Citizens for a Better Env., 523 U.S. 83, 118 S.Ct. 1003 (1998). 19

Taylor v. Vt. Dep't of Ed., 313 F.3d 768 (2d Cir. 2002) 15

Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400 (2d Cir. 2006)..... 8

United States Constitution

U.S. Const., Art. 3, §2 2-3
U.S. Const. amend. XIV ..... i, 3, 6

Federal Statutes

20 U.S.C. § 1400, *et seq.* ..... throughout
20 U.S.C. § 1415 12-13
28 U.S.C. § 41 3
28 U.S.C. § 1254 3
28 U.S.C. § 1291 3
28 U.S.C. § 1294 3
28 U.S.C. § 1331 2
28 U.S.C. § 1365 2
29 U.S.C. 701, *et seq.* 3
42 U.S.C. § 1983 5
42 U.S.C. § 12101, *et seq.* 5
Fed. R. Civ. P. 12 (b)(1) 7
Fed. R. Civ. P. 12 (b)(6) 7

State Statute

8 N.Y.C.R.R. § 200.5 6-7

Legislative History

131 Cong. Rec. 21392-93 (1985) 17
H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985) 14

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IN THE
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JOSEPH A. LEVINE,

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THE GREECE CENTRAL SCHOOL DISTRICT, MONROE 2-ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HOEFT, AMY PERITSKY, and KENNETH MERKEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph A. Levine respectfully petitions for a writ of certiorari from the United States Court of Appeals for the Second Circuit in *Joseph A. Levine v. The*

Greece Central Sch. Dist., et al., Docket No. 09-0910-cv.

OPINION BELOW

The opinion of the United Sates Court of Appeals for the Second Circuit was not selected for publication in the Federal Reporter but can be found at *Levine v. Greece Central Sch. Dist.*, et al., Slip Copy, 2009 WL 3765813 (C.A.2 (N.Y.)) (See App. at A-1).

JURISDICTION

The District Court had subject matter jurisdiction of this civil action arising under the Constitution and laws of the United States. Jurisdiction of this action was proper in the District Court pursuant to 28 U.S.C. § 1331 and § 1365. United States District Judge Michael A. Telesca in the Western

District of New York granted a motion to dismiss in a Decision and Order dated February 4, 2009. Petitioner filed a timely notice of appeal to the Second Circuit Court of Appeals on March 5, 2009.

The Second Circuit Court of Appeals had proper jurisdiction over appeals from final judgments of the District Court under 28 U.S.C. §§ 41, 1291, and 1294. A panel of the Second Circuit issued its Decision on November 12, 2009. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution, Art. 3, Section 2, clause One, provides in relevant part, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made..."

Constitution, Amendment XIV, Section One, provides in relevant part that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Individuals with Disabilities Education Act ("IDEA") , 20 U.S.C. § 1400 *et seq.*

CONCISE STATEMENT OF THE CASE

WESTERN DISTRICT OF NEW YORK

Petitioner Joseph A. Levine ("Joseph") filed a Complaint against Respondents alleging federal claims under the Individuals with Disabilities Education Act ("IDEA") [20 U.S.C. § 1400 *et seq.*], Section 504 of the Rehabilitation Act of 1973 ("Section 504") [29 U.S.C. 701 *et seq.*], the Americans with Disabilities Act ("ADA") [42 U.S.C. 12101 *et seq.*], the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and federal claims pursuant to 42 U.S.C. Section 1983.

Petitioner Joseph Levine based his claims upon the Respondents' failure to provide him with a free appropriate public

education ("FAPE"). Joseph Levine has documented processing disorders and significant sub-average intelligence. Despite these conditions, Respondents failed to implement Joseph's individualized education program ("IEP"). As a result of his disabilities, Joseph claimed that Respondents discriminated against him resulting in unwarranted suspensions, harassment, failure to provide services and repeated physical violence.

Attorneys for Respondents Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso and Kathleen Madonia ("BOCES Respondents") filed a motion to dismiss on April 1, 2008. Attorneys for Respondents Greece Central

School District, Donald Nadolinski, Deborah Hoeft, Amy Perisky, and Kenneth Merkey ("Greece CSD Respondents") filed a motion to dismiss on May 16, 2008. Both sets of respondents sought dismissal on two grounds: lack of subject matter jurisdiction under F.R.CP. 12(b)(1) and failure to state a claim under Fed.R.Civ.P. 12(b)(6). In a February 4, 2009 judgment, Federal District Court Judge Telesca of the Western District of New York granted BOCES and Greece CSD Respondents' motions to dismiss based upon a lack of subject matter jurisdiction pursuant to Fed.R.Civ.P 12(b)(1) solely because Plaintiff allegedly failed to exhaust administrative remedies. However, Judge Telesca did not address the 12 (b)(6) motion

regarding the merits of the underlying case as such action would have been an exercise of jurisdiction.

II. SECOND CIRCUIT COURT OF APPEALS AFFIRMS

Petitioner Joseph Levine appealed from the dismissal in a timely manner. In its November 12, 2009 decision, a panel of the Second Circuit Court of Appeals affirmed the judgment of the District Court asserting that "we may affirm on any basis supported by the record, including grounds not relied on by the district court." *See, e.g. Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006). In its affirmance, the Second Circuit held that "we conclude, that even if failure to exhaust administrative remedies under the IDEA does not divest the federal

courts of subject matter jurisdiction, Levine's complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused."

REASON FOR GRANTING THIS PETITION:

I. POINT: CONFLICT EXISTS AMONG AND WITHIN THE CIRCUIT COURTS REGARDING WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES PURSUANT TO THE INDIVIDUALS WITH DISABILITIES ACT ("IDEA") DIVESTS DISTRICT COURTS OF SUBJECT MATTER JURISDICTION OR WHETHER EXHAUSTION OF ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE.

A. INTRODUCTION

For children and adolescents with disabilities and their families, the IDEA is legislation of incalculable importance in its provision for their free, appropriate public education ("FAPE"). In enacting the IDEA, Congress made the finding that:

> it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.
> 20 U.S.C. §1400(c) (6).

Thus, ensuring a consistent approach amongst the Circuit Courts for the enforcement of this guarantee of public education is a matter of imperative public importance. The present conflict between and within the Circuit Courts means district courts do not have a uniform approach to exercising subject matter jurisdiction with regard to this important federally protected right.

B. "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES" IS A JURISDICTIONAL DEFECT IN THE SECOND CIRCUIT.

This court has yet to definitively address whether a failure to exhaust administrative remedies under the IDEA completely divests a district court of subject matter jurisdiction. However, unlike the present case, one panel of the Second Circuit found that the failure to exhaust administrative remedies was jurisdictional in *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.240 (2d Cir. 2008). In stark contrast, given the opportunity to affirm a district court decision on the same basis the very next year, another Second Circuit panel in *Levine* failed to make the same definitive holding. This lack of clarity breeds differing results for similarly situated plaintiffs

throughout the country in violation of the Fourteenth Amendment's guarantees of due process and equal protection. Regardless of the underlying facts of *Levine*, the case raises an import issue regarding the subject matter jurisdiction of district courts which is "capable of repetition yet evading review." *Spencer v. Kemna*, 523 U.S.117, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

It is well-settled precedent that a plaintiff typically must exhaust all available administrative procedures before filing suit in federal court under the auspices of IDEA. *J.S. v. Attica Cent. Schools*, 386 F.3d 107, 112 (2d Cir. 2004); see 20 U.S.C. § 1415 (e)(2); A-379. Under New York State's regulations, either "[a] parent or a school

district may initiate a hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child." 8 N.Y.C.R.R. § 200.5(i)(1). The available procedures in New York State include an impartial hearing and an appeal of the hearing officer's decision to a "State review officer of the State Education Department." See 20 U.S.C. §§ 1415(f), (g); 8 N.Y.C.R.R. § 200.5(j)(1).

C. That the "Exhaustion" requirement, even in the Second Circuit is not absolute, lends credence to the point that it must not be jurisdictional.

Despite the foregoing, it is of paramount import that we emphasize that the exhaustion requirement is "not an

inflexible rule." *Mrs. W. v. Tirozzi*, 832 F.2d 748,755 (2d. 1987). Instead, Congress specified that exhaustion is not necessary if (1) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies. Id. at 756 (quoting H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). Futility, in particular, has been found where: (1) the plaintiff would be seeking administrative relief from the same entity that failed to implement specific provisions of the student's IEP; (2) the problems alleged are "systemic violations"

that cannot be addressed by the available administrative procedures; or (3) the agency would have been unable to remedy the alleged injury at the time it occurred. *Polera v. Bd. of Ed. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488-89 (2d Cir. 2002); *J.S. v. Attica Central Schools*, 386 F.3d at 113; see also *Michaels ex. rel Michaels v. Mills*, 2004 WL 816918 ("[T]here are several exceptions to the IDEA's exhaustion requirement, including, *inter alia*, (1) futility, (2) 'an agency has failed to provide services specified in the child's individualized education program [IEP]' and (3) 'an agency has adopted a policy or pursued a practice of general applicability that is contrary to law.' ") (citing *Taylor v.*

Vt. Dep't of Ed., 313 F.3d 768, 789 (2d Cir.2002)). In the Second Circuit, the burden of proving the applicability of one of these exceptions falls on the party seeking to avoid the exhaustion requirement. *Polera*, 288 F.3d at 488, n. 8. In the present case, Plaintiff had argued, amongst other things, futility based upon systemic violations citing other cases within the school district such as *K.B. et al v. Bd. of Ed. of the Greece Central Sch. Dist.*, 05-CV-06261(DGL) (W.D.N.Y. 2007)

In addition, Congress specifically noted that there are certain situations in which it is not appropriate to require the exhaustion of IDEA administrative remedies before filing a civil lawsuit, including

complaints that "an agency has failed to provide services specified in the child's individualized educational program [IEP]." *See S.J.B. ex rel. Berkhout v. New York City Dept. of Ed.*, 2004 WL 1586500 at *5 (S.D.N.Y. 2008), citing *Polera*, 288 F.3d at 489; *Heldman v. Sobol*, 962 F.2d 148, 158 n. 11 (2d Cir. 1992) (quoting 131 Cong. Rec. 21392-93 (1985)); *see also Scaggs v. New York Dept. of Ed.*, 2007 WL 1456221 at *6, (E.D.N.Y. 2007) (failure to implement IEP is exception to exhaustion requirement).

D. Even if the Second Circuit decided that no exception applied here, its ruling nonetheless derived from the Circuit's rule that the failure to exhaust is jurisdictional and not an affirmative defense.

In the *Levine* case, the Second Circuit affirmed a decision of a district court which

had held that a family's failure to exhaust administrative remedies under the IDEA divested the federal court of subject matter jurisdiction over their case. *Levine v. Greece Central Sch. Dist., et al,* 2009 WL 3765813 (2d Cir. 2009). However, this Second Circuit chose to affirm on other grounds than did the district court thus highlighting the confusion and conflict between and within the Federal Circuit Courts of Appeal. *Id.* In *Levine*, a panel of the Second Circuit consisting of Circuit Judges Leval, Parker and Livingston side-stepped the question of whether or not the exhaustion requirement is jurisdictional. *Id. See also, Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204 (2d Cir. 2007). Dodging the subject matter

jurisdiction question, the Second Circuit stated that "whether or not the exhaustion requirement is jurisdictional, exhaustion of administrative remedies is a prerequisite to a civil suit unless the plaintiff can allege that an exception should apply." *Levine v. Greece Central Sch. Dist., et al,* 2009 WL 3765813 (2d Cir. 2009) citing *Coleman*, 503 F.3d 198, 204-205. Despite Supreme Court precedent admonishing federal courts to avoid reaching the merits on a case prior to determining their subject matter jurisdiction, the Second Circuit in the case at bar specifically addressed the merits of Joseph Levine's case without addressing subject matter jurisdiction. *See Steel Co. v. Citizens for a*

Better Env., 523 U.S. 83, 95, 118 S.Ct. 1003, 1012 (1998).

The *Levine* court relied upon *Coleman*, a case in which the Second Circuit acknowledged that "[w]e have been equivocal in our discussion of the IDEA's exhaustion requirement . . . . [b]ut we are not forced to decide whether our precedent, which labels the IDEA's exhaustion requirement as a rule affecting subject matter jurisdiction rather than an 'inflexible claim-processing' rule that may be waived or forfeited, remains good law... because there can be no claim of waiver [based on these facts]." 503 F.3d at 204-205. In *Avoletta v. City of Torrington*, 2008 WL 905882, *8 (D.Conn. 2008), the district court stated that the Second Circuit

was "yet to reach a clear conclusion" on whether failure to exhaust is a jurisdictional bar or is only an affirmative defense that is subject to waiver.

While the panel in *Levine* relied on the *Coleman* line of cases which equivocated on subject matter jurisdiction, the panel chose to completely ignore a newer contrasting precedent set only the prior year by another Second Circuit panel of judges consisting of Circuit Judges Feinberg, Calabresi and Wesley. In *Cave v. East Meadow Union Free Sch. Dist.*, this Second Circuit panel made a definitive holding that:

> [T]he district court lacked subject matter jurisdiction over appellants' federal claims because, before filing their suit, appellants failed to exhaust the administrative remedies

provided by the Individuals
with Disabilities Education Act
("IDEA").
514 F.240 (2d Cir. 2008).

In the *Cave* case, a student with hearing impairment and his parents sought an injunction against the school to allow him to bring his service dog into his high school. *Id.* In contrast to the plaintiff in *Levine*, the student received correct information about administrative review of the school district's decision to bar the service dog from the school. However, the family chose not to use this procedure. Also, in contrast to *Levine*, the student in *Cave* was reportedly receiving a wide range of special education and support services and was functioning satisfactorily under the approved IEP. In any event, *Cave* ruled definitively that the law of

the Second Circuit is that the failure to exhaust administrative remedies divests the district court of jurisdiction and is not considered an affirmative defense.

E. THERE IS AN IRRECONCILABLE CONFLICT IN THE CIRCUITS ON THE ISSUE OF WHETHER THE FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS JURISDICTIONAL.

In contrast to the Second Circuit's conflicting precedents regarding the subject matter jurisdiction issue, other U.S. Circuit Court of Appeals have definitively upheld district courts decisions finding that they lack subject matter jurisdiction in cases where the plaintiff failed to exhaust administrative remedies under the IDEA prior to filing a lawsuit. *See, e.g., M.M. v. Sch. Dist. Of Greenville County,* 303 F.3d 523 (4th Cir. 2002), *Pedroza v. Los Alamitos Sch.*

Dist., 302 Fed.Appx. 608 (9th Cir. 2008), *Ellenberg v. New Mexico Mil. Instit.*, 478 F.3d 1262 (10th Cir. 2007), *J.P. v. Cherokee County Bd. of Ed.*, 218 Fed. Appx. 911 (11th Cir. 2007).

Conversely, the Seventh Circuit reaffirmed its conclusion that the exhaustion requirement was an affirmative defense and not a complete jurisdictional bar. *Mosely v. Bd. of Ed. of City of Chicago.*, 434 F.3d 527, 532-33 (7th Cir.2006). In *Mosely*, the plaintiff alleged that her son endured a hostile environment at school as a result of his disabilities similar to the case at bar. *Mosely*, 434 F.3d at 529. School officials called the police officers and filed criminal charges against the student with disabilities.

Mrs. Mosley's son could not longer attend public school but had to finish his education through a G.E.D. program. Id. at 530. The Seventh Circuit, relying on language in *Eberhart v. United States,* 546 U.S. 12 (2005) (that courts should distinguish between jurisdictional labels to delineate classes of cases and claims-processing labels) and citing to its earlier decision in *Charlie F. v. Bd. of Ed. of Skokie Sch. Dist. 68*, 98 F.3d 989 (7th Cir.1996), concluded that the exhaustion requirement came under the claims-processing label and, therefore, it was waivable, whereas jurisdiction was not. *Mosely,* 434 F.3d at 533.

F. THE ISSUE HEREIN IS ONE OF NATIONAL IMPORTANCE IN THAT THIS COURT SHOULD GIVE GUIDANCE TO DISABLED STUDENTS.

The IDEA seeks to "ensure that educators and parents have the necessary tools to improve educational results for children with disabilities..." 20 U.S.C. 1400(d). Petitioner submits that granting this petition for certiorari would give educators and parents nationwide much-needed guidance as a Supreme Court precedent would create a consistent approach to the exercise of subject matter jurisdiction in cases involving education for children with disabilities. This issue is also of paramount importance in the proper administration of the federal courts within their constitutional framework as an "appellate federal court must satisfy itself not only of its own jurisdiction, but also that

of lower courts in cause under review."

Mitchell v. Maurer, 55 S.Ct. 162 (1934).

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: Rochester, New York

February 9, 2010

Respectfully submitted,

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APPENDIX A

HOnly the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.
Joseph A. **LEVINE**, Plaintiff-Appellant,
v.
GREECE CENTRAL SCHOOL DISTRICT, Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Kathleen Madonia, Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey, Defendants-Appellees.
No. 09-0910-cv.

Nov. 12, 2009.

Background: Student brought action against school district defendants and Board of Cooperative Educational Services (BOCES) defendants for violations of the Individuals with Disabilities Education Act (IDEA), in relation to injuries he suffered while a student, and for defendants' alleged failure to provide him with a free appropriate public education (FAPE). The United States District Court for the Western District of New York, Telesca, J., 2009 WL 261470, dismissed for lack of subject matter jurisdiction. Student appealed.

Holding: The Court of Appeals held that student failed to exhaust administrative remedies under the IDEA.

Affirmed.

West Headnotes

Schools 345 ⚿0

345 Schools

Allegation that a school district official told student's parents, in response to father's statement that he thought an impartial hearing was needed, that there was not a need to hold such a meeting, and that the school district would get student the help he needed, was insufficient to support estopping school district defendants from asserting an exhaustion defense in student's action alleging violations of the Individuals

with Disabilities Education Act (IDEA), in relation to injuries he suffered while a student, and for defendants' alleged failure to provide him with a free appropriate public education (FAPE); student filed a complaint with the New York State Education Department (SED) after official made the statement, showing that student's parents did not rely on the official's statement that the district would provide the student the

help needed. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, J.).Jeffrey Wicks, Law Office of Jeffrey Wicks (Seth T. Molisani, on the brief), Rochester, N.Y., for Plaintiff-Appellant.

Dale A. Worrall, Harris Beach LLP, Pittsford, N.Y., for Defendants-Appellees Greece Central School District, Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey.

Michael S. Cerrone, Webster Szanyi LLP, Buffalo, N.Y., for Defendants-Appellees Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Kathleen Madonia.

Present PIERRE N. LEVAL, BARRINGTON D. PARKER and DEBRA ANN LIVINGSTON, Circuit Judges.

APPENDIX A

SUMMARY ORDER

*1 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Plaintiff-Appellant Joseph A. Levine ("Levine") appeals from a judgment of the United States District Court for the Western District of New York (Telesca, J.) entered on February 4, 2009 granting the motions to dismiss of Defendants-Appellees Greece Central School District ("GCSD"), Donald Nadolinski, Deborah Hoeft, Amy Peritsky, and Kenneth Merkey (collectively "District Defendants") and Monroe 2-Orleans Board of Cooperative Educational Services("BOCES"), David Mancuso, and Kathleen Madonia (collectively "BOCES Defendants"). Levine brought suit against Defendants-Appellees for violations of the Individuals with Disabilities Education Act (IDEA), § 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983, in relation to injuries he suffered while a student at GCSD and BOCES from 2005 until 2007, and for Defendants-Appellees' alleged failure to provide him with a free

appropriate public education (FAPE) as required by the IDEA. The district court dismissed Levine's complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) because Levine had failed to exhaust his administrative remedies as required by the IDEA and did not sufficiently allege that any exception to the exhaustion requirement applied. We assume the parties' familiarity with the underlying facts, procedural history, and specification of the issues on appeal.

We review a district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) de novo for conclusions of law; we must also accept the facts alleged in the complaint as true. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir.2006). We may affirm on any basis supported by the record, including grounds not relied on by the district court. *See, e.g., Thyroff v. Nationwide Mut. Ins. Co.* ., 460 F.3d 400, 405 (2d Cir.2006).

A. The IDEA's Exhaustion Requirement

"It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in

federal or state court." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 112 (2d Cir.2004). This administrative process "includes review by an impartial due process hearing officer and an appeal from that hearing." *Id.* (citing 20 U.S.C. § 1415(f), (g)). A party who, under other federal statutes, seeks relief that is also available under the IDEA must satisfy the IDEA's exhaustion requirements. *See id.* at 116; 20 U.S.C. § 1415(l).

There is no dispute that Levine did not exhaust the administrative remedies available to him and required by the IDEA. The parties do dispute whether the IDEA's exhaustion requirement is jurisdictional-that is, whether failure to exhaust administrative remedies prevents a federal court from exercising subject matter jurisdiction over the claim, or whether failure to exhaust is merely an affirmative defense that must be raised by the defendant or else is subject to waiver or forfeiture. Whether or not the exhaustion requirement is jurisdictional, exhaustion of administrative remedies is a prerequisite to a civil suit unless the plaintiff can allege that an exception should apply. *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204-05 (2d Cir.2007). We need not address whether it is jurisdictional. Both sets of defendants raised

the exhaustion issue before the district court. *See* id. at 204 (declining to decide whether the IDEA exhaustion requirement is jurisdictional as the defendants did not waive the argument that plaintiff had not exhausted remedies).

*2 Levine argues that, if exhaustion of administrative remedies is merely an affirmative defense, it was premature for Defendants to assert it in a pre-answer motion to dismiss and thus it was waived. We disagree, because the complaint concedes that Levine failed to exhaust administrative remedies. Under those circumstances, when the complaint on its face shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that the plaintiff satisfied the exhaustion requirement, failure to exhaust is a proper ground for a motion to dismiss. *See* Mosely v. Bd. of Educ., 434 F.3d 527, 533 (7th Cir.2006) (describing this "short-cut"); *cf.* United States v. Moreno-Rivera, 472 F.3d 49, 50 n. 2 (2d Cir.2006) (per curiam) (noting that government's objection to the timeliness of appeal could be asserted in motion to dismiss appeal).

B. Equitable Estoppel

Levine further argues that Defendants should be estopped from asserting an exhaustion defense because Defendants made misrepresentations to Levine's parents regarding the necessity of administrative remedies. The complaint alleges that in late 2005, a GCSD official, Defendant Kenneth Merkey, told the Levines, in response to Mr. Levine's statement that he thought an impartial hearing was needed, that "there was not a need to hold such a meeting; further ... that they (GCSD) will get Joseph the help he needs." Compl. ¶ 63. The complaint further alleges that this statement "induced Mr. Levine not to take action on behalf of Joseph ... [and] discouraged Mr. Levine

from exhausting administrative remedies." *Id.* ¶ 64. We note that the complaint alleges nothing that would support an estoppel argument against the BOCES Defendants; therefore this argument is inapplicable to them.

Assuming the facts alleged are true, they do not support an equitable estoppel argument. The complaint alleges that Merkey made his statement to Levine in "late 2005." Compl. ¶ 33. However, many of the complaint's allegations center around conduct of Defendants that took place in 2006 and 2007. *See, e.g., id.* ¶¶ 24, 31-49, 66-69. Moreover,

the complaint discloses that Levine filed a complaint with the New York State Education Department (SED) in March, 2006. *Id.* ¶ 58. The SED complaint shows that the Levines did not rely on Merkey's statement that GCSD would provide Joseph the help needed. Moreover, to support an equitable estoppel argument, a party must show that its detrimental reliance was reasonable under the circumstances. *See Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 447 (2d Cir.2006). The complaint alleges that conditions for Levine did not improve after late 2005 and that the district continued to fail to provide him a FAPE. Compl. ¶ 73. The complaint alleges no facts that would indicate that, under these circumstances, the Levines' continued reliance on Merkey's statement was reasonable. We conclude that the District Defendants are not estopped from arguing that Levine failed to exhaust administrative remedies.

C. Futility

*3 Levine argues that he should be excused from satisfying the IDEA's exhaustion requirements on the ground that it would have been futile for him to resort to the available administrative remedies. A plaintiff is excused from the IDEA's

exhaustion requirement if he proves that "it would be futile to resort to the IDEA's due process procedures." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir.2002). "[A] plaintiff must demonstrate that 'adequate remedies are not reasonably available,' " *Coleman*, 503 F.3d at 205 (quoting *J.G. by Mrs. G. v. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir.1987)), "or that 'the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process.' " *Id.* (quoting *Heldman v. Sobol*, 962 F.2d 148, 158 (2d Cir.1992)). The party seeking to be excused from the exhaustion requirement bears the burden burden of proving futility. *Polera v. Bd. of Educ.*, 288 F.3d 478, 488 n. 8 (2d Cir .2002).

None of the grounds for futility asserted by Levine are supported by the complaint. First, Levine argues that Merkey's statement to his parents constituted action by the defendants that caused the Levines not to exhaust the available administrative remedies. Although we have suggested that parents who are denied the opportunity by the school district to pursue administrative remedies are not subject to the IDEA's exhaustion requirement, *see, e.g., J .G.*, 830 F.2d at 447, the complaint here alleges nothing to suggest that Defendants took any action that prevented the Levines from

seeking an impartial hearing. Moreover, it is undisputed that the Levines received Procedural Safeguards Notices from the District informing them of the availability of such remedies. Compl. ¶¶ 61-62. For the same reasons that Merkey's statement does not estop the District Defendants from asserting a failure-to-exhaust argument, we conclude that the statement also does not amount to an action that prevented the Levines from seeking further review in late 2005 when it was made, or at any point thereafter.

Second, Levine argues that he should be excused from exhausting administrative remedies because the Defendants failed to implement the provisions of his Individualized Education Program (IEP). The complaint, however, alleges that not only did Defendants fail to implement Levine's IEP, Compl. ¶¶ 55, 59-60, but also that Levine's existing IEP was not "appropriate," *id.* ¶¶ 55, 60, and that Defendants failed in various other ways to provide Levine with a FAPE. Our cases that have allowed plaintiffs to avoid the exhaustion requirement due to a school district's failure to implement a student's IEP have done so only in narrow situations in which the plaintiff's claim is limited to the allegation that "a school has failed to implement services that were specified or

otherwise clearly stated in an IEP." *Polera*, 288 F.3d at 489; *see also SJB ex rel. Berkhout v. N.Y. City Dep't of Educ.*, No. 03 Civ. 6653, 2004 WL 1586500, at *5 (S.D.N.Y. July 14, 2004). The complaint's allegations are clearly far broader than the Defendants' failure to implement specific concrete requirements of an IEP, and therefore do not support the argument that it would have been futile for Levine to seek administrative remedies for Defendants' alleged conduct.

*4 Finally, Levine argues that because the problems at GCSD and BOCES were "systemic," failure to exhaust administrative remedies would be futile because such remedies would not be able to solve the larger problems with the way GCSD and BOCES deal with students with special needs. The basis for this argument is that GCSD was the defendant in a class action law suit, *K.B. et al. v. Board of Education of the Greece Central School District*, which alleged that GCSD failed to provide FAPEs to "students requiring special education services." Compl. ¶ 65. The class action was settled in August, 2007. *Id.* We have, however, only allowed a plaintiff to be excused from the exhaustion requirement when the plaintiff challenges conduct that administrative remedies, which focus on the individual needs of particular students, have "no power to correct." *J.S.*, 386 F.3d at 113. These are cases involving "the framework

and procedures for assessing and placing students in appropriate educational programs" or which involve a high volume of complaints challenging general practices by defendants that allegedly violate the IDEA. *Id.* at 114;*see also id.* at 113-14 (collecting cases). Because, as the district court noted, it is clear from the complaint that Levine is challenging the Defendants' treatment of him individually, and does not make allegations other than in conclusory fashion that his situation resulted from systemic violations of the IDEA, *see* Compl. ¶ 65, we conclude that it would not have been futile for him to resort to administrative remedies.

D. Conclusion

We conclude that, even if failure to exhaust administrative remedies under the IDEA does not divest the federal courts of subject matter jurisdiction, Levine's complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused. We have considered Levine's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

APPENDIX A

C.A.2 (N.Y.),2009.

Levine v. Greece Cent. School Dist.

Slip Copy, 2009 WL 3765813 (C.A.2 (N.Y.))

157

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
UNITED STATES SUPREME COURT

JOSEPH A. LEVINE,
Petitioner,

v.

THE GREECE CENTRAL SCHOOL DISTRICT, MONROE-2 ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HEOFT, AMY PERITSY, AND KENNETH MERKEY,

Respondents

SUPPLEMENTAL APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

DISTRICT COURT ORDERS

WDNY Decision and Order SA-1

WDNY Judgment in a Civil Case SA-29

United States District Court,
Western District of New York.
Joseph A. **LEVINE**, Plaintiff,
v.
The **GREECE CENTRAL SCHOOL DISTRICT** and Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Katherine Madonia, Donald Nadolinski, Deborah Hoeft, Amy Perisky, Kenneth Merkey and other Known or Unknown Parties, Defendants.
No. 08-CV-6072.

Feb. 4, 2009.

Jeffrey Wicks, Jeffrey Wicks, PLLC, Rochester, NY, for Plaintiff.

Brian Laudadio, Dale A. Worrall, Joshua D. Steele, Sara E. Visingard, Harris Beach LLP, Pittsford, NY, Michael S. Cerrone, Webster Szanyi, LLP, Buffalo, NY, for Defendants.

DECISION and ORDER
MICHAEL A. TELESCA, District Judge.

SUPPLEMENTAL APPENDIX

INTRODUCTION

Plaintiff Joseph **Levine** ("plaintiff" and/or "**Levine**") brings this action against defendants **Greece Centra lSchool District** (the "District"), Donald Nadolinski ("Nadolinski"), Deborah Hoeft ("Hoeft"), Amy Perisky ("Perisky"), Kenneth Merkey ("Merkey") (collectively the "District Defendants"), Monroe 2-Orleans Board of Cooperative Educational Services ("BOCES"), David Mancuso ("Mancuso") and Katherine Madonia ("Madonia") (collectively the "BOCES Defendants"). The complaint contains six separately enumerated causes of action against defendants arising out of the special education and related services plaintiff received beginning in 2005. Specifically, plaintiff alleges that defendants failed to provide plaintiff with a free appropriate public education ("FAPE") pursuant to the Individuals with Disabilities Education Act ("IDEA") in violation of: 1) the IDEA; 2) Section 504 of the Rehabilitation Act of 1973 ("Section 504" or the "Rehabilitation Act"); 3) the Americans with Disabilities Act ("ADA"); 4) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; 5) the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and 6) 42 U.S.C. § 1983.

The District Defendants and BOCES Defendants (collectively "defendants") now move to dismiss the claims brought by plaintiff pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants contend that it is undisputed that plaintiff failed to exhaust his administrative remedies as it relates to his IDEA and IDEA-related claims. Moreover, plaintiff has not set forth an adequate claim of futility and accordingly, plaintiff's admitted failure to exhaust his administrative remedies requires the dismissal of his claims under Fed.R.Civ.P. 12(b)(1) since the Court lacks subject matter jurisdiction over such claims. Defendants alternatively argue that even assuming that plaintiff's claims are not subject to dismissal for lack of subject matter jurisdiction, plaintiff's claims must be dismissed for failure to state a claim upon which relief may be granted pursuant to Fed. R.Civ.P. 12(b)(6).

Plaintiff concedes that he did not exhaust his administrative remedies. However, plaintiff argues that the exhaustion requirement would have been futile because: (1) defendants allegedly had a "long history of failing" plaintiff; (2) the administrative process would have resulted in "innumerable administrative meetings;" and (3) defendants allegedly failed to notify plaintiff of "the exhaustion requirement." *See id.*, ¶ 77. In

addition, plaintiff alleges that he was not required to exhaust administrative remedies because the District waived its right to assert that defense. *See id.*, ¶ 78.

For the reasons set forth below, the defendants' motions to dismiss under Rule 12(b)(1) for failure to exhaust administrative remedies is granted.

BACKGROUND

A. Facts

The complaint alleges that plaintiff is a student in the **Greece Central School District** and at all relevant times to the claims in the Complaint received special education and related services from the District. *See* Compl. ¶ 16-17. During the relevant time period, plaintiff attended classes at the District and at BOCES pursuant to the Bridges Program, which offers alternatives to students who are at risk of leaving high school. *See id.*, ¶ 21.

Plaintiff admits that he did not exhaust his administrative remedies, but to avoid dismissal argues that exhaustion of administrative remedies would have been futile. Defendants argue that while exhaustion has been excused in situations where a party has not received any notice of the procedural rights afforded to it under the IDEA, that is not the case here since plaintiff

has been informed of his procedural rights under the IDEA. The District sent plaintiff's parents a copy of the July 1, 2005 Procedural Safeguards Notice prepared by the Commissioner. *See id.*, ¶ 61. The Notice advised parents of their procedural rights, including their right to request an impartial hearing, their right to appeal the hearing officer's final decision to the State Review Officer ("SRO"), and their right to appeal the SRO's final decision to either a state or federal court. *See id.* In addition, the District subsequently sent plaintiff's parents another Procedural Safeguards Notice dated September 13, 2005 with the same notice provisions. *See id.* Again, in October 2007 the District sent plaintiff's parents yet another Procedural Safeguards Notice with similar notice language. *See id.*, ¶ 62. The District claims that it was only required by law to inform the plaintiff and/or his parents of their procedural rights under the IDEA, a requirement that plaintiff acknowledges the District fulfilled. *See id.*, ¶¶ 61-62. However, the District was not required to walk the plaintiff through the administrative process.

B. Procedural History

Plaintiff, through his parents, previously commenced an action on August 22, 2007 in this Court ("Action I").[FN1] In Action I, plaintiff alleged that he was denied access to special education services and denied FAPE by the District and BOCES. *See* Action I Compl., ¶¶ 14, 16-19. Defendants moved to dismiss the Complaint in Action I contending, among other things, that plaintiffs had failed to exhaust their administrative remedies under the IDEA. On January 4, 2008, plaintiffs filed a Notice of Voluntary Dismissal of their Complaint in response to defendants motion to dismiss for failure to exhaust administrative remedies. Thereafter, on February 19, 2008, plaintiff commenced this current action. The most significant difference between the current Complaint and the Complaint in Action I is that plaintiff now alleges that he fits within the futility exception to the exhaustion of administrative remedies rule of the IDEA. *See* Compl., ¶¶ 61-74, 77-78. On April 2, 2008 and May 16, 2008, the BOCES Defendants and the District Defendants

FN1. Action I was commenced by plaintiff's parents on his behalf since he was seventeen years old at the time Action I was filed. Plaintiff reached the age of majority on November 22, 2007 and thus commenced this current action on his own behalf.

respectively moved to dismiss the Complaint in its entirety, pursuant to Fed.R.Civ.P. 12(b)(1) and (6). Plaintiff responded on July 31, 2008. The District Defendants and BOCES Defendants replied on August 15, 2008 and August 18, 2008 respectively.

DISCUSSION

I. *Motion to Dismiss Standard*

The BOCES Defendants and the District Defendants have moved to dismiss both under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. In reviewing a motion to dismiss under Rule 12(b)(1), the court "must accept as true all material factual allegations in the complaint, but we are not to draw inferences from the complaint favorable to plaintiffs." *See J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir.2004) (citation omitted). Moreover, the court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but we may not rely on conclusory or hearsay statements contained in the affidavits." *See id.* (citations omitted). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *See Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir.2005).

In considering a motion for dismissal under Rule 12(b)(6), the Supreme Court has

expressly stated that it favors the requirement that the plaintiff plead enough facts "to state a claim for relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, ----, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007). The Court explained that the complaint "must be enough to raise a right to relief above the speculative level." *See id.* at 1965. To be clear, *Bell Atlantic* does not require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *See id.* at 1974.

The Second Circuit has interpreted *Bell Atlantic* to require "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *See Iqbal v. Hasty,* 490 F.3d 143, 157-58 (2d Cir.2007). In applying this standard, the district court must still accept the factual allegations set forth in the Complaint as true and draw all reasonable inferences in favor of plaintiff. *See Cleveland v. Caplaw Enter.,* 448 F.3d 518, 521 (2d Cir.2006); *Nechis v. Oxford Health Plans, Inc.,* 421 F.3d 96, 100 (2d Cir.2005). In deciding a 12(b)(6) motion, the Court is confined to "the allegations contained within the four corners of the complaint." *See Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 71 (2d Cir.1998).

However, the Court may examine "any written instrument attached to [the complaint] or any statements or documents incorporated in it by reference" as well as any document on which the complaint relies heavily. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-153 (2d Cir.2002). "Of course, it may also consider matters of which judicial notice may be taken[.]" *See Kramer v. Time Warner, Inc.*, 837 F.2d 767, 773 (2d Cir.1991) (Courts "routinely take judicial notice of documents filed in other courts ... not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings.")

"A court presented with a motion to dismiss under both Fed.R.Civ.P. 12(b)(1) and 12(b)(6) must decide the 'jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction.' " *See Coveal v. Consumer Home Mortgage, Inc.*, 2005 WL 2708388, at *2 (E.D.N.Y.2005) (quoting *Magee v. Nassau County Med. Ctr.*, 27 F.Supp.2d 154, 158 (E.D.N.Y.1998)); *see also Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir.1990) (noting that a motion to dismiss for failure to state a claim may be decided only after finding subject matter jurisdiction).

II. *The IDEA's Exhaustion Requirement*

It is well-settled that, prior to bringing a suit

in federal court under the IDEA, plaintiffs must exhaust all available administrative procedures. *See* 20 U.S.C. § 1415(l). In the State of New York, these include an impartial hearing and an appeal of the hearing officer's decision to a SRO. *See*20 U.S.C. §§ 1415(f), (g); 8 N.Y.C.R.R. § 200.5. Parents may request a hearing to present complaints relating to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." *See* 20 U.S.C. § 1415(b)(6). "[F]ailure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction." *See Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir.2002) (citing *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir.1995)).[FN2]

FN2. Plaintiff contends that defendants' motions to dismiss is premature since the failure to exhaust is an affirmative defense that can be raised only "after the answer is served." *See* Pl. Br. at 9. This argument is without merit since the law in the Second Circuit is that "failure to exhaust is a jurisdictional bar, not an affirmative defense that is subject to waiver." *See Avoletta v. City of Torrington*, 2008 WL 905882 at *8 (D.Conn.2008); *see also Combier-Kapel v. Biegelson*, 2007 WL 1704953 at *1 (2d Cir.2007) (district court lacked subject matter jurisdiction over unexhausted IDEA claims); *M.K. v. Sergi*, 554 F.Supp.2d 201, 218 (D.Conn.2008), citing *Polera*, 288 F.3d at 483 (holding that "[a] plaintiff's failure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction").

Furthermore, the IDEA statute requires plaintiffs with any claims related to the education of disabled children, whether brought under IDEA or another statute (i.e., the Rehabilitation Act), to exhaust the administrative remedies available under IDEA prior to initiating a federal lawsuit. *See*20 U.S.C. § 1415(l) ("Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.") (citations omitted); *see also Polera,* 288 F.3d at 481 ("[P]otential plaintiffs with grievances related to the education of disabled children generally must exhaust their administrative remedies before filing suit in federal court, even if their claims are formulated under a statute other than the IDEA (such as the ADA or the Rehabilitation Act)"); *accord J.S.,* 386 F.3d at 112;*Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 248 (2d Cir.2008) ("The language of Section 1415(l) of the IDEA is sufficiently broad and encompasses complaints asserted under any federal

statute, as long as they seek relief available under the IDEA."); *Hope v. Cortines,* 872 F.Supp. 14, 17 (E.D.N.Y.), aff'd, 69 F.3d 687 (2d Cir.1995) (holding that ADA, § 1983 and § 2000d claims are subject to IDEA's exhaustion requirement).[FN3]

In determining whether plaintiff should be subject to the exhaustion requirement, the Second Circuit instructs courts "to consider whether administrative review would further the goals of developing facts, making use of

FN3. Similarly, IDEA's exhaustion requirement can apply despite plaintiff's claim for damages, which are not available under the statute. *See Polera,* 288 F.3d at 487 ("Courts in the Second Circuit have required exhaustion of administrative remedies even where damages were held to be unavailable through the administrative process. In such cases, plaintiffs were not permitted to evade the IDEA's exhaustion requirement merely by tacking on a request for money damages."); *Buffolino v. Bd. of Educ. of Sachem Cent. Sch. Dist. at Holbrook,* 729 F.Supp. 240, 247 (E.D.N.Y.1990) ("[I]f the Court were to hold that plaintiffs in this case are excused from exhausting their remedies because adequate relief could not be obtained, plaintiffs could avoid administrative procedures merely by asking for relief that administrative authorities could not grant."); *see also B.D. v. DeBuono,* 130 F.Supp.2d 401, 428 (S.D.N.Y.2000) ("[P]laintiffs should not be allowed to avoid the administrative requirements of IDEA by claiming only monetary damages or other relief not available under IDEA.").

available expertise, and promoting efficiency." *See J.S.*, 386 F.3d at 113 (citing *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir.1992)). Here, plaintiff concedes that he did not exhaust his administrative remedies. As discussed above, plaintiff's admitted failure to exhaust his administrative remedies deprives this Court of subject matter jurisdiction over his IDEA and IDEA-related claims.

III. *The Futility Exception to the Exhaustion Requirement*[FN4]

The exhaustion requirement does not apply in situations in which "exhaustion would be futile because administrative procedures do not provide adequate remedies." *See Heldman v. Sobol,* 962 F.2d 148, 158 (2d Cir.1992) (citing *Honig v. Doe,* 484 U.S. 305, 326-27, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (stating that "parents may bypass the administrative process where exhaustion

FN4. The BOCES Defendants contend that plaintiff's entire futility argument is predicated on alleged wrongdoing by the District and accordingly, these allegations cannot be used as a basis for finding that exhaustion of administrative remedies would have been futile as it relates to the BOCES Defendants. *See* Boces Defs. Reply Br. at 5. Boces Defendants contend that plaintiff's claims against them must be dismissed.

would be futile or inadequate") and *Smith v. Robinson,* 468 U.S. 992, 1014 n. 17, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984)). Such futility has been found where: (1) the plaintiff would be seeking administrative relief from the same entity that failed to implement specific provisions of the student's individualized education program ("IEP"); (2) the problems alleged are "systemic violations" that cannot be addressed by the available administrative procedures; or (3) the agency would have been unable to remedy the alleged injury at the time it occurred. *See Polera,* 288 F.3d at 488-89;*J.S.,* 386 F.3d at 113;*see also Michaels v. Mills,* 2004 WL 816918 at *3 n. 17 (W.D.N.Y.2004) ("[T]here are several exceptions to the IDEA's exhaustion requirement, including, (1) futility, (2) 'an agency has failed to provide services specified in the child's ... [IEP]' and (3) 'an agency has adopted a policy or pursued a practice of general applicability that is contrary to law.' ") (citations omitted).

A. Administrative Relief

Plaintiff attempts to avoid dismissal of his claim for lack of subject matter jurisdiction by arguing that he falls within the futility exception to the IDEA's exhaustion requirement. The party seeking to avoid exhaustion bears the burden of showing futility. *See*Polera, 288 F.3d at 488 n. 8

(citing *Honig,* 484 U.S. at 327). Plaintiff argues that "there was no point to [plaintiff] filing another SED [State Education Department] complaint in an attempt to enforce compliance with the CAP [Compliance Assurance Plans] that SED imposed on the District in his favor." *See* Pl. Br. at 10. Plaintiff's argument is baseless because the administrative remedy that he was required to exhaust was an impartial hearing and not a complaint to SED.

The IDEA requires an aggrieved party to exhaust his or her administrative remedies through the detailed processes outlined in § 1415 of the statute prior to seeking relief in court. *See*20 U.S.C. § 1415 et. seq. The plaintiff was required to have a hearing before an IHO and then a second hearing before an SRO of the New York State Education Department. *See*20 U.S.C. §§ 1415(k)(3), 1415(g). Only after the administrative hearing and appeals process is exhausted does the plaintiff have "the right to bring a civil action with respect to the complaint" in a state court or federal district court. *See Handberry v. Thompson,* 436 F.3d 52, 60 (2d Cir.2006) quoting *J.S.,* 386 F.3d at 112 ("It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court[.]")

Exhaustion of administrative remedies is required so that disputes regarding the education of disabled children are first analyzed by administrators with expertise in the area who can promptly resolve grievances. *See J.S.*, 386 F.3d at 112. "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *See id.* (quotation marks and citation omitted); *see also Polera,* 288 F.3d at 487. At the very least, the administrative process will provide a helpful record for those issues before the federal court. *See id.* at 113.

Moreover, plaintiff's reliance on *SJB v. N.Y. City Dep't of Educ.,* 2004 WL 1586500 (S.D.N.Y.2004) is misplaced. *See* Pl. Br. at 9-10. Unlike *SJB,* plaintiff here never pursued a decision from an IHO. Plaintiff in this case merely filed a complaint with the SED. In addition, unlike the present plaintiff, the *SJB* plaintiff was seeking enforcement of several prior and favorable IHO decisions. Accordingly, unlike the instant case, the educational expertise of administrators "had already produced a binding plan for the

education of *SJB* ... [a]ll that remained was for the defendant to implement it." *See SJB,* 2004 WL 1586500 at *5. In this case, plaintiff proceeded directly to litigation and failed to utilize the educational expertise of the administrators.

As is clear from the Complaint, plaintiff does not seek to enforce what he deems to be an appropriate IEP. Rather, plaintiff alleges that the District "failed to set up an appropriate IEP." *See* Compl. ¶ 55; *see also* Compl. ¶ 60 ("... even though [the District] now were mandated [i.e. by the SED] to provide for [plaintiff's] IEP, they continued to fail to include [plaintiff's] parents in creating an IEP, continued to fail to place [plaintiff] in alternative placement, continued to fail to create an appropriate IEP[.]") These are precisely the kinds of "factual issues [that] are best left to the expertise of the involved agencies rather than the courts." *See Michaels,* 2004 WL 816918 at *3;*see also Polera,* 288 F.3d at 487 n. 3 (noting that the "IDEA's exhaustion requirement was intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in an area and promptly resolve grievances"); *Heldman,* 962 F.2d at 159, n. 17 ("The exhaustion doctrine prevents courts from undermining the administrative process and

permits an agency to bring its expertise to bear on a problem as well as to correct its own mistakes").

Further, plaintiff's "failure to implement" argument as a basis for the futility exception to the exhaustion requirement also fails. *See Polera,* 288 F.3d at 489;*see also*SJB 2004 WL 1586500 at * 5 ("[W]here an IEP-related claim is based on a district's failure to implement services already spelled out in an IEP, exhaustion is excused.") (citing *Polera,* 288 F.3d at 489, and *Heldman,* 962 F.2d at 158 n. 11);*Michaels,* 2004 WL 816918 at *3 ("[T]he 'legislative history of the IDEA suggests an exhaustion exception for situations concerning the implementation of an IEP, as opposed to the contents of an IEP.' ") (emphasis in original) (quotations omitted). In evaluating claims of futility on the basis of "failure to implement," the Second Circuit has advised that

> [A] court must closely examine a plaintiff's claims before concluding that they involve nothing more than "implementation" of services already spelled out in an IEP. Here, [plaintiff's] assertion that her claim relates solely to implementation does not make it so.... Polera's claim unavoidably encompasses both a

> failure to provide services and a significant underlying failure to specify what services were to be provided.

See Polera, 288 F.3d at 489. Here, plaintiff does not even attempt to categorize his claim as merely a claim for implementation. Instead, he asserts that the District Defendants failed to create an appropriate IEP for him, failed to place him in an alternative placement, and failed to provide requested services. *See* Compl. at ¶¶ 55, 60, 68, 79. This Court finds that, even construing the facts most favorably to plaintiff, he has failed to meet his burden of demonstrating that, on the basis that his claim involves a failure to implement services set forth in IEP plans, exhaustion of administrative remedies would be futile in this case. Thus, plaintiff is not excused from the exhaustion requirement on this ground.

B. Proper Notice

Exhaustion of administrative remedies will be dispensed with "[w]here the State is to blame for the failure of plaintiffs to exhaust their administrative remedies because it somehow deprived them of their right to proper notice and a hearing in accordance with due process." *See Buffolino*, 729 F.Supp. at 245;*see also J.G. v. Bd. of Educ. of*

Rochester City School Dist., 830 F.2d 444, 447 (2d Cir.1987). With regard to the defendants' motions to dismiss, the Court finds that the plaintiff's failure to exhaust his administrative remedies prior to commencement of this action is not excusable. Essentially, plaintiff contends that he did not receive proper notice of his administrative remedies from the District and therefore his failure to exhaust his administrative remedies should be excused. Due to the nature of the evidence at hand, the Court finds that the District fully informed plaintiff and his parents of "their right to proper notice and a hearing in accordance with due process." *See Buffolino*, 729 F.Supp. at 245.

Firstly, the plaintiff and/or his parents admittedly received Procedural Safeguards Notices in July 2005, September 2005 and October 2007. *See* Compl. at ¶¶ 61-62. The notices advised parents of the procedural rights afforded to them, including their right to request an impartial hearing, their right to appeal the hearing officer's final decision to the SRO, and their right to appeal the SRO's final decision to either a state or federal court. *See id.* Most importantly, plaintiff's only issue with these notices is that they did not advise him that his administrative remedies had to be exhausted before filing a law suit. The District however,

was under no obligation to provide such notice nor can plaintiff point to any authority which requires such a notification. *See Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F.Supp.2d 263, 270 (N.D.N.Y.2000) (dismissing plaintiffs' IDEA claim for failure to exhaust administrative remedies where plaintiffs "were sent notice of their due process rights" to an impartial hearing). Therefore, the Court is persuaded that the District fully informed plaintiff of his right to pursue an impartial hearing.

C. Systemic Violations

Plaintiff also argues that he should be excused from the exhaustion requirement on the basis that his claims allege "systemic violations" of IDEA. Specifically, plaintiff bases his systemic violations argument on (1) the fact that the District was named as a defendant in a class action lawsuit entitled *K.B. et al. v. Bd. of Educ. of the Greece Cent. Sch. Dist.*, 05-CV-6262 (DGL) (*"K.B."*), which was settled; and (2) the allegation that the District "continued a policy and practice of denying FAPE to students placed in BOCES 2 Bridges Program." *See* Pl. Br. at 12. The District Defendants contend that even if true, which they argue are not, plaintiffs allegations fail to establish the existence of systemic violations.

The Second Circuit has found systemic violations where the complaint alleges "wrongdoing that is inherent in the program itself and not directed at any individual child." *See J.S.*, 386 F.3d at 113. Specifically, where a school completely fails to implement the procedures set forth in IDEA, systemic violations that cannot be cured by administrative procedures are present. *See Handberry*, 446 F.3d at 344 (declining to apply exhaustion requirement where "individual administrative remedies would be insufficient to address the defendants' failure to provide the services required by the IDEA.") (citation omitted); *J.S.*, 386 F.3d at 114 (describing systemic violations as those which "could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process").

In *J.S.*, the Second Circuit held that systemic violations were present where six students brought a complaint styled as a class-action, challenging a school district's "total failure to prepare and implement [IEPs]," and the district's dereliction of its duties: "to notify parents of meetings as required by law," "to provide parents with

legally required progress reports," "to provide appropriate training to school staff," "to perform timely evaluations and reevaluations of disabled children," "to provide parents with required procedural safeguards regarding identification, evaluation, and accommodation of otherwise disabled children," and "to perform legally required responsibilities in a timely manner, including providing and implementing transition plans, transitional support services, assistive technology services, and declassification services for children with disabilities." *See*386 F.3d at 115.

Similarly, in *Handberry,* the Second Circuit relied upon its decision in *J.S.* in holding that plaintiffs were excused from exhausting their administrative remedies under IDEA based upon the futility exception for systemic cases where the complaint alleged that New York City jails had failed to provide any educational services, including special educational services, to prison inmates. *See Handberry,* 446 F.3d at 343-44 (citing *J.S.,* 386 F.3d at 114-15). The Second Circuit noted that application of the exhaustion requirement was not appropriate because "[t]he purposes of exhaustion-to allow [ ] for the exercise of discretion and educational expertise by state and local agencies[ ]-are unavailing where the alleged issue is the absence of any services whatsoever." *See id.*

at 344 (quotation marks and citations omitted); *see also Jose P. v. Ambach,* 669 F.2d 865, 867 (2d Cir.1982) (declining to apply exhaustion requirement where plaintiffs challenged New York State and City education authorities' extensive delays in evaluating and placing disabled students in appropriate programs).

In these cases, the Second Circuit has consistently distinguished the problem of inadequate educational programs and facilities, which constitute systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators. The instant case presents claims unlike those set forth in *J.S., Handberry,* and *Jose P.* The Complaint makes allegations of failure with respect to plaintiff alone and not a failure that "is inherent on the program itself." Specifically, allegations that the District had a "long history of failing [plaintiff]," or that plaintiff's parents would have to "meet in innumerable administrative meetings, without end" in order to resolve the alleged failures, do not support plaintiff's claim of systemic violations. *See* Compl. at ¶ 77. In addition, the allegations of the Complaint contradict plaintiff's claim that the violations he alleges were shared by other students of

the District since the Complaint is specifically limited to the services plaintiff was provided. Importantly, the Complaint asserts that "other similarly disabled students *have been* provided the means to achieve a FAPE. Thus, [plaintiff] has been treated differently and singled out from others with similar learning or other disabilities." *See* Compl. at ¶ 23 (emphasis in original). The Court finds that these allegations do not constitute systemic violations.

Further, while plaintiff attempts to rely on *K.B.* and the subsequent settlement of that case, he does not explain how that complaint and consent decree demonstrate the existence of systemic violations in his own Complaint. [FN5] Plaintiff provides no authority in support of his argument that a prior law suit that was not litigated on its merits can show systemic violations in a subsequent complaint. Accordingly, the Court is not persuaded by plaintiff's argument. Because plaintiff has not

FN5. The District was named as a defendant in *K.B.*, which was ultimately settled. That the District was named as a defendant in a case that was settled is irrelevant to plaintiff's Complaint, especially since the consent decree contained no admission of guilt or misconduct on the District's part. In addition, the terms of the consent decree bar plaintiff from invoking any of its substantive obligations in this action.

established systemic violations, plaintiff is therefore not excused from the exhaustion requirement of IDEA, and this Court may not exercise subject-matter jurisdiction over plaintiff's IDEA and IDEA-related claims.

CONCLUSION

For the reasons set forth above, this Court lacks subject matter jurisdiction over plaintiff's IDEA and IDEA-related claims. Accordingly, the BOCES Defendants and the District Defendants' motions to dismiss are granted pursuant to Rule 12(b)(1) for failure to exhaust. Thus, the Complaint is dismissed in its entirety as against all the defendants.

ALL OF THE ABOVE IS SO ORDERED.

W.D.N.Y.,2009.
Levine v. Greece Cent. School Dist.
Slip Copy, 2009 WL 261470 (W.D.N.Y.)

SUPPLEMENTAL APPENDIX

United States District Court,
Western District of New York.
Joseph A. **LEVINE**, Plaintiff,
v.
The **GREECE CENTRAL SCHOOL DISTRICT** and Monroe 2-Orleans Board of Cooperative Educational Services, David Mancuso, Katherine Madonia, Donald Nadolinski, Deborah Hoeft, Amy Perisky, Kenneth Merkey and other Known or Unknown Parties, Defendants.
No. 08-CV-6072.

JUDGMENT IN A CIVIL ACTION

This action was decided by Judge David G. Larimer on a motion for dismissal. BOCES Defendants and the District Defendants' motions to dismiss are granted pursuant to Rule 12(b)(1) for failure to exhaust, the complaint is dismissed in its entirety against all defendants.

Date: Feb. 5, 2009

CLERK OF COURT
s/ Tricia M. Ofray
Signature of Clerk or Deputy Clerk

161

(3)

No. 09-1098

Supreme Court, U.S.
FILED
MAY 14 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH A. LEVINE,

Petitioner,

vs.

THE GREECE CENTRAL SCHOOL DISTRICT, MONROE-2 ORLEANS BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DAVID MANCUSO, KATHLEEN MADONIA, DONALD NADOLINSKI, DEBORAH HOEFT, AMY PERISKY, AND KENNETH MERKEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Opinion affirming the District Court's dismissal of Petitioner's Complaint does not conflict with a decision of this Court or a Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Second Circuit's Opinion affirming the District Court's dismissal of Petitioner's Complaint does not implicate an important federal question of law that should be settled by this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Petitioner's Complaint	2
II. The Western District of New York Dismisses Petitioner's Complaint	3
III. The Second Circuit Affirmed the Dismissal of Petitioner's Complaint	3
REASONS FOR DENYING THE PETITION	4
I. The Second Circuit's Decision Does Not Conflict with a Decision of this Court or any Court of Appeals	5
II. Petitioner's Complaint Does Not Present an Important Issue of Federal Law that This Court Should Decide	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Mosely v. Bd. of Educ., 434 F.3d 527 (7th Cir. 2006) 4, 5, 6

Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2d Cir. 2002) 8

STATUTES

20 U.S.C. §1415(c)(1)(C) 8

20 U.S.C. §1415(i) 7

8 N.Y.C.R.R. §200.5(f)(1) 8

RULES

Fed.R.Civ.P. 12(b)(1) 3

Fed.R.Civ.P. 12(b)(6) 3, 5

Sup. Ct. R. 10 ..... 1, 4

Sup. Ct. R. 10(a) 1, 6

Sup. Ct. R. 10(c) 1

INTRODUCTION

Petitioner, Joseph Levine (the "Petitioner"), has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted (the "Petition"). Sup. Ct. R. 10. Petitioner has not, and cannot, make the required showing that: (1) the Second Circuit's November 12, 2009 Summary Order and Opinion (the "Opinion") conflicts with a decision of this Court or any Court of Appeals; or (2) the Second Circuit decided an important federal question of law that should be settled by this Court. Sup. Ct. R. 10(a), (c).

According to Petitioner, there is a split between the Circuits with respect to whether the failure to exhaust administrative remedies under the Individuals With Disabilities Education Act ("IDEA"): (a) divests federal courts of subject matter jurisdiction; or (b) like a claims processing rule, provides defendants with only an affirmative defense. (Petition, pp. 23-24). The Second Circuit's Opinion, however, did not rely on lack of subject matter jurisdiction in affirming the dismissal of Petitioner's Complaint. (Opinion, pp. 4, 8). Rather, the Second Circuit held that regardless of whether failure to exhaust administrative remedies divests federal courts of subject matter jurisdiction, dismissal was still appropriate because Petitioner's Complaint admitted that he failed to exhaust administrative remedies. (*Id.*). Therefore, the decisions of other Circuit Courts as to the characterization of the exhaustion requirement are irrelevant and are not in conflict with the Second Circuit's Opinion.

Moreover, Petitioner's Complaint does not present "an important issue of federal law" that this Court should decide. The Second Circuit's Opinion is fact specific – the court ruled that dismissal was warranted because there was no possibility that Petitioner's Complaint could be amended to allege facts demonstrating that Petitioner satisfied the IDEA's exhaustion requirement. The Second Circuit declined to decide any issues beyond that limited factual question.

Accordingly, Petitioner has failed to meet his burden of demonstrating that there exists compelling reasons for this Court to grant the Petition. The Petition should be denied in all respects.

STATEMENT OF THE CASE

I. Petitioner's Complaint.

Petitioner's Complaint against Respondents contains six causes of action arising out of the special education and related services he received during the 2005-2006, 2006-2007, and 2007-2008 school years. (A 10-23). In almost all respects, the Complaint was identical to an earlier complaint filed by Petitioner against the Respondents that he had voluntarily withdrawn. (A 129-53). The only material difference between the prior complaint and the current Complaint is that the current Complaint admits that Petitioner did not exhaust his administrative remedies and alleges that exhaustion would have been

futile because: (1) Respondents had a long history of failing Petitioner; (2) exhaustion would have resulted in "innumerable administrative meetings"; and (3) Petitioner was not informed of the exhaustion requirement. (A 23-29).

II. The Western District of New York Dismisses Petitioner's Complaint.

Respondents moved to dismiss Petitioner's Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) on the grounds that Petitioner admittedly failed to exhaust administrative remedies under the IDEA.[1] (A 121-22). By Decision and Order dated February 4, 2009, the Western District of New York dismissed Petitioner's Complaint in its entirety pursuant to Rule 12(b)(1) for failure to exhaust his administrative remedies. (A 372-92). The court further ruled that Petitioner had failed to allege any facts that supported his argument that exhaustion would have been futile. (A 381-91).

III. The Second Circuit Affirmed the Dismissal of Petitioner's Complaint.

The Second Circuit Court of Appeals affirmed. In doing so, the Second Circuit found it unnecessary to decide whether the IDEA's exhaustion requirement is

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[1] The Petition incorrectly states that Petitioner "allegedly failed to exhaust administrative remedies." (Petition, p. 7).

jurisdictional or a claims processing rule. As explained by the Second Circuit, "even if failure to exhaust administrative remedies under the IDEA does not divest the federal courts of subject matter jurisdiction, [Petitioner's] complaint contains no allegations sufficient to demonstrate that his failure to comply with this mandatory statutory requirement should be excused." (Opinion, p. 8). Where, as here, a "complaint on its face shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that the plaintiff satisfied the exhaustion requirement, failure to exhaust is a proper ground for a motion to dismiss." (Opinion, p. 4). Significantly, the Second Circuit's Opinion relies, in part, upon *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006), the case asserted by Petitioner to show a conflict between the Circuits. (Petition, pp. 23-25).

REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with a decision of this Court or any Court of Appeals, nor does it implicate an important federal question of law that should be decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Second Circuit's Decision Does Not Conflict with a Decision of this Court or any Court of Appeals.

Petitioner claims that the Second Circuit's Opinion conflicts with the Seventh Circuit's decision in *Mosely*, which treats the IDEA's exhaustion requirement as a claims processing rule, but it does not.

Contrary to Petitioner's argument, the Second Circuit declined to reach the issue of whether the IDEA's exhaustion requirement is a claims processing rule or jurisdictional. The Second Circuit expressly found that it "need not address whether [the exhaustion requirement] is jurisdictional" because even if exhaustion was not jurisdictional, Petitioner's Complaint must still be dismissed. (Opinion, pp. 3, 4, and 8). In reaching this conclusion, the Second Circuit relied partly on the Seventh Circuit's decision in *Mosely*.

Indeed, a review of *Mosely* shows that even the Seventh Circuit would have affirmed the dismissal of Petitioner's Complaint. In *Mosely*, the Seventh Circuit expressly recognized that, even if considered an affirmative defense, the courts will grant a Rule 12(b)(6) motion for the failure to exhaust administrative remedies where "there is no way any amendment could salvage the claim." *Id.* at 533. *Mosely* did not dismiss the complaint only because there was "nothing on the face of [the plaintiff's] complaint that compel[led] a conclusion that she failed to exhaust"

her administrative remedies. *Id.* Unlike *Mosely*, however, it is undisputed that Petitioner here failed to exhaust administrative remedies in as much as the Complaint specifically admits the failure and contains an entire section unsuccessfully alleging that exhaustion would have been futile. (A 23-29).

Neither does the Second Circuit's decision affirming dismissal of Petitioner's Complaint conflict with an opinion of this Court. As Petitioner concedes, this Court has never ruled on this issue. (Petition, p. 11).

Because: (1) this Court has not ruled on the issue; and (2) the Second Circuit's Opinion not only fails to conflict with the Seventh Circuit, but actually cites it in support of its decision to affirm the dismissal of the Complaint, Petitioner fails to demonstrate any compelling reason for this Court to grant the Petition under Supreme Court Rule 10(a).

II. Petitioner's Complaint Does Not Present an Important Issue of Federal Law that This Court Should Decide.

Throughout the Petition, Petitioner attempts to establish that the Court's grant or denial of review of the Second Circuit's Opinion will have a significant impact on the rights of students, parents, and school districts under the IDEA. Petitioner argues that "ensuring a consistent approach amongst the Circuit Courts for the enforcement of [the IDEA's] guarantee of public education is a matter of imperative public

importance." (Petition, p. 10). Likewise, Petitioner claims that granting his Petition "would give educators and parents nationwide much-needed guidance as a Supreme Court precedent would create a consistent approach to the exercise of subject matter jurisdiction in cases involving education for children with disabilities." (*Id.* at p. 26). These arguments are not credible.

As noted above, the Second Circuit's decision rests upon the specific facts of Petitioner's case – holding that Petitioner's Complaint shows that there is no possibility that it could be amended to allege facts that, if true, would demonstrate that Petitioner satisfied the exhaustion requirement. Thus, Petitioner presents a fact specific inquiry only – not an "important issue of federal law."

Moreover, the classification of the IDEA's exhaustion requirement has a minimal effect on the administration of the IDEA. Petitioner readily admits that "[i]t is well-settled precedent that a plaintiff typically must exhaust all available administrative procedures before filing suit in federal court under the auspices of IDEA." (Petition, p. 12). The exhaustion requirement is also specifically included in the statute. 20 U.S.C. §1415(i). Indeed, exhaustion of the administrative process has always been paramount to the successful operation of the IDEA. This is true because, among other things, the administrative process "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational

issues, furthers development of a complete factual record, and promotes judicial efficiency." *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002). The importance of the administrative process, together with the "well-settled precedent" requiring exhaustion, invariably leads to the conclusion that the classification of the exhaustion requirement will have no bearing on the majority of cases. In short, the exhaustion requirement is explicit and well-known.

Petitioner's argument that granting the Petition would provide "educators and parents nationwide much-needed guidance" is unsupported by fact or law. Significantly, all parents of students receiving services under the IDEA are already provided notice of the administrative remedies available under the IDEA pursuant to 20 U.S.C. §1415(c)(1)(C). Moreover, many parents receive even far more guidance than that required by the provisions of the IDEA as a result of various state education laws and regulations. Petitioner, for example, received an approximately forty-four page "Procedural Safeguards Notice" pursuant to 8 N.Y.C.R.R. §200.5(f)(1). (A 186-230). That notice included notification of the exhaustion requirement. (A 215-16).

Finally, not only would granting the Petition have little effect on the general operation and administration of the IDEA and the rights of the individuals and institutions it covers, it would also have no effect on the final outcome of Petitioner's case. As already discussed, the Western District

dismissed the Complaint for lack of subject matter jurisdiction and the Second Circuit affirmed that dismissal on the grounds that even if exhaustion was not jurisdictional, Petitioner's admitted failure to exhaust was fatal to his claims. Accordingly, even if this Court granted the Petition and then ruled that exhaustion of administrative remedies is not jurisdictional, it would have no effect on Petitioner's claims against Respondents.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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